

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MCC NON FERROUS TRADING INC.,
Plaintiff,

- against -

AGCS MARINE INSURANCE COMPANY,
Defendant.

Civil No. 14-CV-8302 (JCF)

**AFFIDAVIT OF BRIAN KIM IN SUPPORT OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT ON ALLIANZ DEFENSES REGARDING THEFT WITH
FRAUDULENT INTENT AND THE "INFIDELITY" EXCLUSION**

STATE OF NEW YORK)
)
) ss.
COUNTY OF WESTCHESTER)

Brian Kim, being first duly sworn, deposes and says:

1. I am Contract Administrator for Metallica Commodities Corp. and for MCC Non Ferrous Trading, Inc. ("Metallica"), Plaintiff in this Action. I make this affidavit in support of the Plaintiff's Motion for Summary on Defendant AGCS Marine Insurance Company's ("Allianz") defenses regarding: (1) Theft with Fraudulent Intent; and (2) the "Infidelity" exclusion. I am fully familiar with and have personal knowledge of the items set forth below.

2. Metallica has been involved in trading non-ferrous metals and specializes in the commercial recycling of residues and byproducts generated by the mining and metallurgical industries.

3. As part of Metallica's normal course of business, it purchases copper scrap and re-sells the same material to another buyer or user. Metallica typically does this by entering into separate transactions with both seller and buyers of metals including scrap metals like copper scrap.

4. In October 2013, Metallica entered into a contract, dated October 16, 2013 (the "McQan-Metallica Contract"), with a South Korean company to purchase copper scrap from the Philippines that was being sold by an entity named McQan Corporation ("McQan"). McQan's principal, J.Y. Lee, was a gentleman with whom Metallica had worked before on several occasions and continues to do so. Attached hereto as Exhibit A is a true and correct copy of the McQan-Metallica Contract that obligated McQan to, among other things, sell to Metallica "Copper wire scrap as per ISRI Berry" in an approximate amount of 300 MT.

5. Prior to entering into the October 16, 2013 Contract with McQan, Metallica asked for and received confirmation from Mr. Lee of the existence of the copper scrap to be purchased from McQan in an amount over 300 MT.

6. McQan provided Metallica with photographs of the copper scrap that Mr. Lee personally inspected in the Philippines prior to October 16, 2013.

7. Metallica's CEO, Mr. Glendon Archer, signed the McQan-Metallica Contract on October 13, 2013. The contract with McQan was made and kept in the

ordinary course of Metallica's business and was signed on or about the time reflected in the purchase contract.

8. McQan signed the McQan-Metallica Contract on or about October 17, 2013 and returned to my attention the signed purchase agreement on or about that date.

9. At the time that Metallica entered into the purchase transaction with McQan, it had never heard of Riverbend Enterprises and had no dealing with Riverbend Enterprises. It was not until November 2013 that Metallica had ever heard of such an entity or that it was the entity that had previously sold copper scrap to McQan.

10. On October 16, 2013, Metallica entered into a sales transaction of copper scrap with a European copper smelter, Aurubis AG Recycling (the "Metallica-Aurubis Contract"). Attached hereto as Exhibit C is a true and correct copy of the Metallica-Aurubis Contract.

11. Because the copper scrap in the cargo containers had been stolen and replaced with construction materials and debris, Aurubis informed Metallica that it was refusing the shipment of cargo as delivered.

12. Metallica notified McQan promptly of the cargo theft. Attached hereto as Exhibit D is a true and correct copy of the notice Metallica sent to McQan informing them of the cargo theft.

13. On or about December 20, 2013, Allianz was notified of the theft of cargo. Attached hereto as Exhibit E is a true and correct copy of the notice Metallica's insurance brokers sent to Allianz informing them of the cargo theft.

14. Metallica purchased an “open” all-risk “Ocean Marine Cargo Policy”, No. OC91257500 (the “Insurance Policy”) from Allianz. A true and correct copy of the Insurance Policy as received by Metallica in the ordinary course of its business is attached as Exhibit A to Plaintiff’s Complaint.

15. In May 2014, Allianz denied insurance coverage for the theft of the copper scrap purchased by Metallica from McQan.

16. In its May 14, 2014, letter denying insurance coverage, Allianz stated that there was not 307 MT of copper scrap in the cargo containers, but instead “50 – 60 MT.” A true and correct copy of the May 14, 2014 Allianz letter to Paul J. Fitzpatrick of Nausch, Hogan & Murray, Inc., Metallica’s insurance broker, that I received is attached hereto as Exhibit F.

17. In the May 14, 2014 letter, Allianz argued that fewer than 307 MT of copper scrap existed because the thief of the copper allegedly “recycled” the copper scrap from previously loaded cargo containers to others.

18. Thereafter, on at least two occasions, Allianz was asked at Metallica’s request for a copy of the Allianz investigative report that allegedly supported Allianz’ assertion that only “50 – 60 MT” of copper scrap was carried to the port of Manila.

19. Allianz refused to disclose the report to Metallica or its insurance broker until Allianz answered the Complaint on November 10, 2014, at which time Allianz’ counsel made a portion of the investigator’s report available.

20. Metallica has purchased all risk cargo insurance from Allianz since the year 2012.

21. In 2012, Metallica insured approximately \$350MM of cargo; in 2013, Metallica insured approximately \$500MM of cargo; and in 2014, Metallica insured approximately \$420MM of cargo.

22. Metallica has had only two instances involving damage to or loss of cargo in the time it has purchased all risk insurance from Allianz—one involving limited damage to cargo that never exceeded the policy's deductible that was never tendered by Metallica, and the other being the pending insurance claim for which Allianz has denied insurance coverage. Allianz has never paid an insurance claim of Metallica (other than reimbursing a fraction of the costs paid by Metallica for demurrage, transport and disposal charges associated with the pending insurance claim for copper scrap).

/s/ Brian Kim
BRIAN KIM

Sworn to before me this
26th day of January, 2015

/s/ Amra Pasic
NOTARY PUBLIC

AMRA PASIC
Notary Public, State of New York
No. 01PA6228187
Qualified in Westchester County
Commission Expires Sept. 13, 2018